

**OIL & GAS DOCKET NO. 7B-0237357**

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**COMMISSION CALLED HEARING ON THE COMPLAINT OF BOO-ROW PIPE & SUPPLY, INC., CONCERNING THE IMPROPER TRANSFER OF OPERATOR OF THE J. W. DAVIS (03932) LEASE, J. W. DAVIS LEASE, WELL NO. 1 (RRC ID NO. 122630), AND J. W. DAVIS LEASE, WELL NO. 13 (RRC ID NO. 122631), STEPHENS COUNTY REGULAR FIELD, STEPHENS COUNTY, TEXAS**

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**APPEARANCES:**

**FOR COMPLAINANT:**

James Brazell  
Don Rhodes  
James Henry Nail III

**COMPLAINANT:**

Boo-Row Pipe & Supply, Inc.

**FOR INTERVENOR:**

Glenn Johnson  
James N. Bostic  
Jerry Cramer  
Bill Spencer

**INTERVENOR:**

Squyres Oil Company, Inc.

**PROPOSAL FOR DECISION**

**PROCEDURAL HISTORY**

**DATE OF COMPLAINT:**

May 23, 2003

**COMMISSION GRANTED HEARING:**

October 21, 2003

**DATE OF HEARING:**

January 20, 2004

**HEARD BY:**

Scott Petry, Hearings Examiner  
Margaret Allen, Technical Examiner

**RECORD CLOSED:**

April 2, 2004

**PFD PREPARED BY:**

James M. Doherty, Hearings Examiner  
Margaret Allen, Technical Examiner

**PFD CIRCULATION DATE:**

November 9, 2004

**STATEMENT OF THE CASE**

This hearing was called to consider the complaint of Boo-Row Pipe & Supply, Inc. (“Boo-Row”), that Forms P-4 (Certificates of Compliance and Transportation Authority) changing the operator of the J. W. Davis (03932) Lease, the J. W. Davis Lease, Well No. 1 (RRC ID No. 122630), and the J. W. Davis Lease, Well No. 13 (RRC ID No. 122631) (“Davis Leases”) from Squyres Oil Company, Inc. (“Squyres”) to Boo-Row, which the Commission approved on May 13-15, 2003, were signed on behalf of Boo-Row by a person having no authority to execute the Forms P-4. Boo-Row seeks revocation of the Commission’s approval of the Forms P-4.<sup>1</sup>

A hearing was held on January 20, 2004, before Scott Petry, Hearings Examiner, and Margaret Allen, Technical Examiner. Both Boo-Row and Squyres appeared and presented evidence. The record closed on April 2, 2004, when the last closing statements were filed. Subsequent to the hearing, Examiner Scott Petry left the employment of the Commission, and, pursuant to §1.121(c) of the Commission’s General Rules of Practice and Procedure, the case was reassigned to Hearings Examiner James M. Doherty and Technical Examiner Allen for issuance of a proposal for decision.

**APPLICABLE LEGAL AUTHORITY**

For the purposes of Chapter 89 of the Texas Natural Resources Code, §89.002(a) defines “Operator” as a person who assumes responsibility for the physical operation and control of a well as shown by a form the person files with the Commission and the Commission approves.

Statewide Rule 1(a)(4)(E) provides that an operator’s Form P-5 Organization Report shall contain the name of any non-employee agent that the organization authorizes to act for the organization in signing certificates of compliance (Forms P-4) which initially designate the operator or change the designation of the operator [of an oil lease, gas well, or other well].

Statewide Rule 58(a)(1) provides that Form P-4 establishes the operator of an oil lease, gas well, or other well and certifies responsibility for regulatory compliance, including plugging of wells. Form P-4 is required to be filed to change the operator of an oil lease, gas well, or other well. No Form P-4 designating or changing the designation of an operator will be approved that is signed, either as transferor or transferee, by a non-employee agent of the organization unless the organization has filed with the Commission, on its Form P-5 Organization Report, the name of the non-employee agent it has authorized

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<sup>1</sup> The Forms P-4 transferred four wells to Boo-Row, two gas wells (RRC ID Nos. 122630 and 122631) and two oil wells, Well Nos. 8 and 10, on the J. W. Davis (03932) Lease.

to sign on its behalf.

The instructions in the Commission's Form P-4 provide, *inter alia*, that where the form is filed to change the operator of a lease or well, a signature for the previous operator is required in Item 15 ("Previous Operator Certification for Change of Operator P-4 Filing") and a signature for the new/receiving operator is required in Item 16 ("Current Operator Certification"). Item 15 calls for the signature of an "Authorized Employee of previous operator" or an "Authorized agent of previous operator." Item 16 calls for the signature of an "Authorized Employee of current operator" or an "Authorized agent of current operator." The instructions in Form P-4 also provide that in Items 15-16, "A P-4 must be signed by a duly authorized individual in accordance with Statewide Rule 1".

The instructions in Form P-4 further provide that the certificate of compliance may be revoked by the Commission at any time for failure to comply with the oil and gas laws of the State of Texas and the rules, regulations, and orders of the Railroad Commission of Texas.

### **DISCUSSION OF THE EVIDENCE**

#### **Boo-Row Pipe & Supply**

On or about November 18, 2002, three Forms P-4 were filed with the Commission to change the operator of the Davis Leases from Squyres to Boo-Row. These Forms P-4 were signed on behalf of Squyres by Jan Goodall ("Goodall"), Secretary, and on behalf of Boo-Row by Kenny Lowe ("Lowe"), who entered the word "Agent" below his signature. The Goodall and Lowe signatures were dated November 1, 2002. Goodall checked the "Authorized agent of previous operator" portion of Item 15 of the form. Lowe checked both the "Authorized Employee of current operator" and "Authorized agent of current operator" portions of Item 16 of the form.

Item 11 ("Effective date") of the Forms P-4 to change the operator of the Davis Leases from Squyres to Boo-Row was completed with the date January 1, 2001. On the Form P-4 relating to the J. W. Davis (03932) Lease, the January 1, 2001, effective date was stricken, and the date November 18, 2002, was interlineated. Boo-Row was first organized as a Form P-5 operator in August 2002.

Squyres had become the designated operator of the Davis Leases by Form P-4 transfers effective December 1, 1996. The Commission approved the Forms P-4 changing the operator of the Davis Leases from Squyres to Boo-Row on May 13-15, 2003.<sup>2</sup> According to James Henry Nail III ("Nail"), Boo-Row's President, Lowe had no connection with Boo-Row after December 2002. On May 23, 2003,

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<sup>2</sup> The record does not contain an explanation as to why Forms P-4 filed in November 2002 were not approved until May 2003, about 6 months later.

Boo-Row sent correspondence to the Commission objecting to the transfer of the Davis Leases to Boo-Row, stating that Lowe had no authority to sign the Forms P-4 for Boo-Row.<sup>3</sup>

In 2001, Squyres had attempted to transfer the Davis Leases to Lowe Well Service by Form P-4 filings signed on January 1, 2001, on behalf of Squyres by Goodall and on behalf of Lowe Well Service by Lowe. Lowe was owner and resident Texas agent of Lowe Well Service. These earlier Forms P-4 were also proposed to be effective January 1, 2001, but for reasons not disclosed by the record, were not approved by the Commission.<sup>4</sup>

The Form P-5 Organization Reports filed by Boo Row on August 14, 2002, and September 2, 2003, listed Nail as President, Secretary, and Treasurer and as Boo-Row's only officer. Lowe's name did not appear anywhere on these Boo-Row Forms P-5.

Nail testified that Lowe, who had been a long time friend, helped him get into the oilfield equipment salvage business. Lowe apparently was involved in locating equipment for purchase and locating customers to whom the equipment could be resold. Nail provided the necessary money for equipment acquisitions. When Boo-Row was incorporated, Nail was named as the only officer.

Boo-Row provided Lowe with use of a desk in Boo-Row's shop, which Lowe shared with about 12 others, including pipe jockeys and equipment traders. Lowe was also provided with a company truck and a charge account for expenses, considered by Boo-Row as a part of Lowe's commission on sales. However, Nail did not consider Lowe an employee of Boo-Row.<sup>5</sup> He was not reported as an employee on Boo-Row's Employer's Quarterly Reports to the Texas Workforce Commission, and was not paid a salary by Boo-Row. Neither did Nail consider that Lowe was an authorized agent of Boo Row. When Lowe acquired a prospective purchaser for equipment or pipe, Nail quoted to Lowe Boo-Row's price,

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<sup>3</sup> "Form P-4 Notification" notices were mailed by the Commission to Boo-Row on May 15, 2003, advising that the Forms P-4 relating to transfer of the Davis Leases to Boo-Row had been approved. Assuming that Boo-Row received these notices on or about May 19, 2003, Boo-Row sent its letter objecting to the transfers within four days of receipt of notice that the transfers had been approved.

<sup>4</sup> By the time the Forms P-4 were filed to transfer the Davis Leases from Squyres to Boo-Row, the Form P-5 Organization Report of Lowe Well Service was delinquent. The Form P-5 of Lowe Well Service became delinquent in May 2001.

<sup>5</sup> On September 20, 2003, a previous attorney for Boo-Row, Robert M. Cady, sent correspondence to the Commission stating that Lowe's "...duties as an employee included sales of used oil field equipment and delivery and pick up of the said equipment." The Cady correspondence also stated that Nail could not be any clearer that Lowe had never been an authorized agent for Boo-Row and had "never had the authority to legally bind the company in any way." Cady asked the Commission to consider that Lowe's signing of the Forms P-4 to transfer the Davis Leases was a fraud and "stunk to high heaven." Nail filed a prehearing affidavit dated September 21, 2003, agreeing with Cady's correspondence.

and Lowe added an additional amount to compensate himself.

Lowe's name was not carried on Boo-Row's letterhead. However, Lowe himself prepared Boo-Row business cards that carried Lowe's name. Nail testified that he did not consider that Boo-Row had hired Lowe or that it could fire him. Boo-Row did not keep an accounting of Lowe's time or direct Lowe as to the hours he worked. Neither did Boo-Row direct Lowe as to how, where, or when to conduct his activities.

According to Nail, Lowe was never given the authority to sign Forms P-4 on behalf of Boo-Row, and Nail did and said nothing that could have given Lowe the impression that he had such authority. Nail testified that only he had the authority to sign Forms P-4 for Boo-Row. Boo-Row had no agreement or understanding with Squyres regarding the transfer of the Davis Leases to Boo-Row, and no consideration passed from Squyres to Boo-Row, or vice versa, for this transfer. Nail was not aware that the Davis Leases were being transferred to Boo-Row until it was too late to do anything about it.

Nail acknowledged that Lowe had signed certain Forms P-1 (Producer's Monthly Report of Oil Wells) naming himself as agent for Boo-Row. However, he testified that these Forms P-1 related to leases that Lowe originally owned. Lowe was unable to file required financial security to operate these leases in the name of his own company, and in exchange for a 50% working interest, Nail agreed that Boo-Row would be the record operator. Even with respect to these leases, Nail, rather than Lowe, signed the Forms P-4 which transferred the leases into Boo-Row's name. Lowe had the responsibility to supervise the operation of these leases and the responsibility for hiring and firing people who worked on the leases.<sup>6</sup>

Boo-Row takes the position that Lowe was not an employee of Boo-Row or an agent with authority to sign Forms P-4 to transfer leases or wells to Boo-Row. Boo-Row believes that Lowe was a "broker" and independent contractor. It points out that the name of any non-employee agent authorized to sign Forms P-4 changing the operator of a lease or well is required by Statewide Rules 1(a)(4)(E) and 58(a)(1) to be listed on an operator's Form P-5 Organization Report, and that Lowe's name did not appear on Boo-Row's Form P-5. Boo-Row argues that Lowe's signing of Forms P-1 purportedly as "agent" for Boo-Row is no evidence of Lowe's authority to sign Forms P-4 transferring leases or wells to Boo Row, because the Forms P-1 simply reported production on leases in which Lowe had a working interest and did not pertain to acquisition by Boo-Row of any assets or liabilities. Boo-Row requests that the Commission's approval of the Forms P-4 transferring the Davis Leases to Boo-Row be revoked.

**Squyres Oil Company, Inc.**

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<sup>6</sup> Apparently, these leases were the Hickman, Reaves (11418) Lease, the Hickman, Reaves (11562) Lease, and the Newell, Dell (09396) Lease in the Shackelford County Regular Field, and perhaps the ENWCSU (28689) Lease in the Eula, NW (Cook) Field.

Jerry Cramer, a Field Supervisor for Squyres, was responsible for obtaining Lowe's signature on the Forms P-4 requesting a change of operator for the Davis Leases from Squyres to Boo-Row. Cramer testified that after the 2001 Forms P-4 to transfer the Davis Leases to Lowe Well Service were not approved, he was trying "to get signatures, or whatever was necessary to get these out of our name, so we could discontinue running the H-15s and things that cost money to do." Cramer made several trips to see Lowe at Boo-Row where he thought Lowe had an office. According to Cramer, after the original Forms P-4 to Lowe Well Service were not approved, Lowe "kind of beat around the bush a whole lot of times; and finally he says 'We're moving everything under the umbrella of into (sic) Boo-Row.'" Cramer finally found Lowe on Boo-Row's yard, and Lowe signed the Forms P-4 purportedly as "agent," requesting a change of operator of the Davis Leases to Boo-Row. Lowe gave Cramer no indication that he had no authority to sign for Boo-Row.<sup>7</sup>

Squyres retained a consultant to search Commission records for Commission forms signed on behalf of Boo-Row. A total of 8 Forms P-1 were found that Lowe had signed, naming himself as agent for Boo-Row. All 8 of these Forms reported production for the ENWCSU (28689) Lease, the Hickman, Reaves (11418) Lease, the Hickman, Reaves (11562) Lease, and/or the Newell, Dell (09396) Lease. A Form P-4 filed on September 9, 2002, to change the operator of the Newell, Dell (09396) Lease from Yellow Rose Oil & Gas Operating, Inc., to Boo-Row was signed on behalf of Boo-Row by Nail, and had a handwritten change in the name of the gatherer with a notation "per Kenny Lowe 10/09/02."

The consultant for Squyres also found 10 Forms P-4 signed by Brandi Hambright as agent for Boo-Row.<sup>8</sup> All 10 of these Forms P-4 were filed to change the gas purchaser and/or gas gatherer, and none was filed to change the operator of a lease or well.

Squyres takes the position that the Forms P-4 transferring the Davis Leases to Boo-Row were properly approved by the Commission. Squyres believes that Lowe was an employee of Boo Row, and that pursuant to Statewide Rules 1 and 58, any employee of an operator may sign a Form P-4. In addition, Squyres believes that the fact that Lowe signed Forms P-1 for Boo-Row shows that Lowe had been given actual or apparent authority to sign Commission forms on behalf of Boo-Row. Squyres asserts that from all the information that was available, it reasonably believed that Lowe was a Boo-Row employee, and Squyres was entitled to rely on Lowe for execution of the Forms P-4 transferring the Davis Leases to Boo-

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<sup>7</sup> There is no direct evidence that Cramer inquired of Lowe, Nail, or anyone else at Boo-Row as to whether Lowe was authorized to sign "change of operator" Forms P-4 for Boo-Row. Cramer at first testified that he thought he had asked Nail a question about the Davis Leases and been told that Lowe was handling the matter. However, Cramer later testified that he could not remember what question he had asked Nail, and it could have involved the purchase of equipment, which was also a purpose of his visit to Boo-Row's shop. Nail testified that he never discussed transfer of the Davis Leases with Cramer or anyone else connected with Squyres.

<sup>8</sup> Nail identified Hambright as an "everyday" employee of Boo-Row.

Row. Squyres also believes that revocation of the approval of these Forms P-4 would be bad policy, because it would adversely impact the finality of Commission approvals of lease and well transfers and the Commission's ability to fix liability for well plugging and clean up of pollution.

**Examiners' Official Notice**

The examiners have officially noticed Commission well records which show that: (1) the J. W. Davis Lease, Well No. 1 (RRC ID No. 122630) was drilled to a total depth of 1,920' and was completed on February 21, 1921; (2) the J. W. Davis Lease, Well No. 13 (RRC ID No. 122631) was drilled to a depth of 1,940' and was completed on June 16, 1947; and (3) the J. W. Davis (03932) Lease, Well No. 10 was drilled to a depth of 1,974' and completed in January 1947. The depth and completion date of the J. W. Davis (03932) Lease, Well No. 8 are not disclosed by Commission records.

The examiners have also officially noticed Commission production records which show that: (1) no production has been reported for the J. W. Davis Lease, Well No. 1 (RRC ID No. 122630) and the J. W. Davis Lease, Well No. 13 (RRC ID No. 122631) since prior to January 1, 1993<sup>9</sup>; and (2) no production has been reported for the J. W. Davis (03932) Lease since July 2001. For the J. W. Davis (03932) Lease, production of a total of 14 BO was reported for the period May-July 2001, with no report or zero reported production for the remainder of the year. Between January 1, 1993, and December 31, 2000, no more than 1 BO was reported for this lease during any month.

The examiners have further officially noticed Commission certificate of compliance records showing that notices of intent to sever the Davis Leases were issued on August 7, 1995, for delinquent H-15 tests, the violations were resolved on August 30, 1995, and severances of the Davis Leases were also issued on August 6, 2004, for delinquent H-15 tests, which have not been resolved.

The examiners have also officially noticed Commission Form P-4 records showing that as of October 15, 2004, Boo-Row was the operator of 38 oil leases or gas wells. Of the 38 Forms P-4 that sought transfer of these leases or wells to Boo-Row, 35 were signed on behalf of Boo-Row by Nail. The 3 exceptions are the Forms P-4 at issue in this case, which transferred the Davis Leases to Boo-Row and were signed by Lowe.

The examiners have also officially noticed Commission Form P-5 records showing that: (1) Squyres has an active P-5 Organization Report, last filed a Form P-5 on September 30, 2004, and has filed financial security in the form of a letter of credit in the amount of \$50,000; and (2) Boo-Row has an active P-5 Organization Report, last filed a Form P-5 on August 27, 2004, and has filed financial security in the amount of \$50,000.

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<sup>9</sup> Production data is from Commission computer mainframe records which do not contain production, if any, prior to January 1, 1993.

### EXAMINERS' OPINION

The examiners conclude that the Forms P-4 filed with the Commission to change the operator of the Davis Leases from Squyres to Boo-Row were not signed by an authorized employee or authorized agent of Boo-Row, or otherwise authorized by Boo-Row, and the May 13-15, 2003, administrative approvals of the Forms P-4 should be revoked.

To dispose of this case, the examiners find it unnecessary ultimately to decide, as would a court, any inherently judicial issue sounding in tort, contract, or fraud.<sup>10</sup> The Commission has primary jurisdiction to issue certificates of compliance for oil leases and gas wells, and primary jurisdiction to revoke them. The examiners simply apply the Commission's rules, and the instructions in the Commission's Form P-4, to the facts of this case.

Contrary to Squyres' assertion, the Commission has not provided in Statewide Rules 1 and 58 that *any* "employee" of an operator may sign a Form P-4 to change the operator of an oil lease or gas well.<sup>11</sup> In fact, Statewide Rules 1 and 58 say nothing about the circumstances in which an "employee" may sign such a Form P-4 on behalf of an operator. However, the Commission's Form P-4 is instructive. In the particular case of a Form P-4 filed to change the operator of an oil lease or gas well, the Form calls for the signature of an *authorized* employee or *authorized* agent of both the previous operator and the proposed new operator, and the instructions to Form P-4 provide that the required signatures must be provided by a *duly authorized* individual. The examiners conclude that Form P-4 contemplates and requires that when the Form is filed for the purpose of transferring operatorship of an oil lease or gas well, the persons signing the Form must be duly vested with authority to sign for this purpose by the operators they purport to represent.

It is one thing to say that a person is not required to be an officer, partner, or owner of an operator to sign a "change of operator" Form P-4, and quite another to say, incorrectly, that *any* "employee" of an operator, whether with or without authority, may sign. There are sound policy reasons for the requirement that Forms P-4 filed for the purpose of changing the operator of an oil lease or gas well be signed only by *duly authorized* employees or agents of the previous and proposed new operators. Such lease or well transfers are among the most important of an operator's business affairs, because, when approved, they serve to transfer the right to conduct operations subject to the Commission's jurisdiction and to make dispositions of oil or gas, transfer liability for regulatory compliance, including the plugging of wells and clean up of any pollution, and may impact an operator's financial security requirement.

Applying these principles to the facts of this case, the examiners have determined that while Lowe plainly had a connection to Boo-Row, there is no good faith basis in the evidence presented by either party

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<sup>10</sup> Squyres correctly asserts that the Commission has no jurisdiction ultimately to decide such issues.

<sup>11</sup> Boo-Row asserts that under Squyres' theory, regardless of the question of authority, a janitorial employee could sign Forms P-4 transferring away an operator's wells, and the Form P-4 approvals would be irreversible.



to conclude that Lowe, who signed the Forms P-4 to transfer the Davis Leases from Squyres to Boo-Row, was an “employee” of Boo-Row or, even if he was, that he was *duly authorized* by Boo-Row to sign for this purpose. The examiners further have determined that there is no good faith basis in the evidence to conclude that Lowe was an “agent” of Boo-Row *duly authorized* by Boo-Row to sign the Forms P-4 transferring the Davis Leases. A preponderance of the evidence is to the contrary.

An “employee” is a person employed by an employer to perform a service whose physical conduct in the performance of the service is controlled or is subject to the right of control by the employer. *R. E. Cox Dry Goods Co. v. Kellog*, 145 S.W.2d 675, 679 (Tex. Civ. App.-Austin 1940, writ ref.). To constitute the relationship of employer and employee, the employer must have the right to select, control, and, for misconduct, discharge the employee. *Crow v. TRW, Inc.*, 893 S.W.2d 72, 78 (Tex. App.-Corpus Christi 1994, no writ); *Sherard v. Smith*, 778 S.W.2d 546, 548 (Tex. App.-Corpus Christi 1989, writ denied). To be an employer, a person must retain or exercise the power of control over the employee by directing, not merely the end sought to be accomplished, but also the means and details of its accomplishment; in other words, not only what should be done but how it shall be done. *Dougherty v. Gifford*, 826 S.W.2d 668, 678 (Tex. App.-Texarkana 1992, no writ).

Even if a person is an “employee,” his status as such does not necessarily confer authority to enter into business transactions of all types that bind his employer. Employment, standing alone, does not clothe the employee with the powers of an agent. A chief distinction between an agent and an employee is that an agent is engaged to represent his principal in business dealings and to establish contractual relations between the principal and third parties, whereas an employee ordinarily is not. *Duke v. State*, 725 S.W.2d 289, 290 (Tex. App.-Houston 1986, pet. denied).

An “agent” is a person acting under the control of a “principal” in carrying out an assigned task. Even if a person acts for or accommodates another, if the accommodating person is not under the “principal’s” control, an agency relationship does not exist. *Walker v. Federal Kemper Life Assurance Co.*, 828 S.W.2d 442, 452 (Tex. App.-San Antonio 1992, writ denied). The nature and extent to which the “principal” can control the “agent” is the key factor in determining the existence of an agency relationship. *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W.2d 641, 645 (Tex. App.-Amarillo 1987, no writ). Where, for example, a person is empowered to roam the territory to find customers for another’s product with little or no supervision, control, or interference, the relationship is not one recognized in Texas as an agency. *Daily Intern. Sales v. Eastman Whipstock*, 662 S.W.2d 60, 64 (Tex. App.-Houston 1983, no writ).

Where an agency relationship exists, as a general rule, an “agent” has only such authority as the “principal” has either expressly or impliedly conferred on the agent. A principal is not bound by an agent’s acts if such acts are in excess of the agent’s authority. *Hotel Longview, Inc. v. Pittman*, 276 S.W.2d 915 (Tex.Civ.App.-Texarkana 1955, writ ref. n.r.e.).

Lowe was an intermediary involved in the sale and delivery of Boo-Row pipe and equipment to purchasers obtained by Lowe. He also supervised physical operation of four oil leases in which he and

Boo-Row each owned a 50% working interest and of which Boo-Row was the record operator. Boo-Row did not consider that Lowe was its “employee” and did not report him as such on Employer’s Quarterly Reports to the Texas Workforce Commission. Lowe was apparently in charge of how he spent his own time, free to come and go as he chose. Boo-Row did not require that Lowe keep any particular hours of work or keep track of Lowe’s time. Lowe was not paid a salary by Boo-Row, and apparently derived what money he made from locating purchasers for pipe and

equipment dealt in by Boo-Row and adding to Boo-Row’s price an additional sum of money decided upon by Lowe. Boo-Row did not consider that it had the power to hire or fire Lowe, and did not direct Lowe as to how, where, or when to conduct his activities.

Nail gave sworn testimony that Boo-Row never gave Lowe the authority to sign for Boo-Row on Forms P-4 transferring oil leases or gas wells to Boo-Row, and only Nail had the authority to sign for Boo-Row on Forms P-4 filed for this purpose. This sworn testimony is not controverted by any direct evidence, and its credibility is supported by the fact that of the 38 oil leases or gas wells operated by Boo-Row as of October 15, 2004, 35 were transferred to Boo-Row pursuant to Forms P-4 which were signed for Boo-Row by Nail. The only 3 exceptions are the 3 Forms P-4 signed by Lowe which were filed to transfer the Davis Leases from Squyres to Boo-Row, to which Boo-Row objected within about 4 days after receiving notification from the Commission that the leases had been transferred.

On the other side of the ledger, Boo-Row provided a desk which Lowe could share with others when he was at Boo-Row’s shop and provided Lowe with a company truck and a charge account arrangement pursuant to which Lowe’s business-related purchases were considered a part of “commissions” earned by Lowe from the sale of pipe and equipment. Lowe’s name was not carried on Boo-Row’s letterhead, although Lowe apparently printed business cards for himself carrying Boo-Row’s name, with Nail’s apparent acquiescence. There is evidence that Lowe filed 8 Forms P-1 as “agent” for Boo-Row, reporting production on the Hickman, Reaves (11418) Lease, the Hickman, Reaves (11562) Lease, the Newell, Dell (09396) Lease and/or the ENWCSU (28689) Lease. Apparently, Lowe had been the owner of these leases, and Boo-Row agreed to be the record operator of the leases in return for a 50% working interest. Lowe assumed complete responsibility for the operation of these leases, and retained the power to hire and fire people used in their operation. In the opinion of the examiners, these factors, whether considered individually or collectively, do not establish that Lowe was either “employee” or “agent” of Boo-Row *duly authorized* to sign Forms P-4 transferring oil leases or gas wells to Boo-Row.<sup>12</sup>

Squyres argues that Lowe’s signing of Forms P-1, purportedly as “agent” for Boo-Row, evidences a general grant of authority from Boo-Row to Lowe to sign Commission forms for Boo-Row. The

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<sup>12</sup> The casual reference in the Cady correspondence that Lowe’s “. . . duties as an employee included sales of used oil field equipment and delivery and pick up of the said equipment” is not deemed conclusive of the nature of Lowe’s relationship with Boo-Row or a “judicial admission” by Boo-Row. A party’s correspondence invoking an administrative agency’s authority is not governed by the rules of pleading applicable to the courts. *Booth v. Texas Emp. Ins. Ass’n*, 123 S.W. 2d 322, 326 (Comm’n App. 1938). Furthermore, the entire thesis of the Cady correspondence was that Lowe was not a person authorized to sign “change of operator” Forms P-4 for Boo-Row.

examiners are not persuaded that this is so for several reasons. First, the oil leases for which Lowe filed the Forms P-1 apparently were leases originally owned by Lowe and for which Boo-Row had agreed to be the record operator in return for a 50% working interest. Under the arrangement with Boo-Row, Lowe assumed complete responsibility for the physical operation of these leases. Even with respect to these leases, the Forms P-4 which made Boo-Row the record operator were signed for Boo-Row by Nail, not by Lowe.

In addition, Nail specifically denied that Boo-Row had ever granted authority to Lowe to sign Forms P-4 transferring oil leases or gas wells to Boo-Row, and while Lowe had signed Forms P-1 for the particular leases in which he retained a working interest, he had never filed a “change of operator” Form P-4 for Boo-Row up until the time when he signed the Forms P-4 relating to transfer of the Davis Leases. Furthermore, it is entirely plausible that Boo-Row may have acquiesced in the signing by Lowe of Forms P-1 for the particular leases in question, mainly a clerical function, while at the same time withholding from Lowe any authority to file “change of operator” Forms P-4 which serve to transfer assets and liabilities. Finally, in view of the requirements of Statewide Rules 1 and 58, the fact that Boo-Row did not name Lowe on Boo-Row’s Form P-5 Organization Report as a non-employee agent authorized to sign “change of operator” Forms P-4 for Boo-Row speaks powerfully against any presumption that Boo-Row authorized Lowe to sign such Forms P-4 in the same “agent” capacity in which Lowe purported to sign the Forms P-1.

The examiners are similarly unpersuaded by Squyres’ argument that even if Lowe did not have “actual” authority to sign the Forms P-4 transferring the Davis Leases to Boo-Row, he had at least “apparent” authority sufficient to preclude revocation of the Form P-4 approvals. There is considerable doubt that a person whose authority is only “apparent,” as distinguished from “actual,” may sign a “change of operator” Form P-4. According to Form P-4, when filed for the purpose of changing the operator of an oil lease or gas well, the Form must be signed by a *duly authorized* employee or agent of the previous and proposed new operators. This implies strongly that the persons signing must have “actual,” rather than merely “apparent” authority. Under principles of agency, a person with “apparent” authority is no more than an “ostensible agent.” An “ostensible agent” is not really an agent at all, but, under the right circumstances, estoppel may prevent the “principal” from denying the agency. *McDuff v. Chambers*, 895 S.W.2d 492, 498 (Tex. App.-Waco, writ denied).

In order to successfully bind a “principal” for the acts of an “ostensible agent,” that is, in order to establish agency by estoppel: (1) the principal must have held the agent out in other instances, or in the particular transaction, as possessing authority sufficient to embrace the particular act in question, or the principal must have knowingly acquiesced in the agent’s assertion of requisite authority; and (2) the third party dealing with the agent must have relied on the conduct of the principal to the third party’s prejudice. *Hall v. F. A. Halamicek Enterprises, Inc.*, 669 S.W.2d 368, 375 (Tex. App.-Corpus Christi 1984, no writ). Only the conduct of the principal, leading a third party to suppose that the agent has the authority he purports to exercise, may charge the principal through the “apparent” authority of an agent. The acts of the agent are irrelevant. *Southwest Title Ins. Co. v. Northland Bldg. Corp.*, 552 S.W.2d 425 (Tex. 1977). The doctrine of “apparent authority” does not apply if the third party dealing with the agent is not

misled by the representation or conduct of the principal. Therefore, unless there is evidence of knowledge of the principal's representation or conduct and reliance thereon by the third party, the issue of "apparent authority" does not arise. *Lane v. Sullivan*, 286 S.W. 541 (Tex. Civ. App.-Waco 1926, no writ).

There is no evidence that Boo-Row ever represented to Squyres or anyone else that Lowe had authority to sign for Boo-Row on a "change of operator" Form P-4. For reasons already discussed,

the examiners do not believe that Boo-Row engaged in any conduct that reasonably could be construed to clothe Lowe with "apparent" authority to sign such a Form P-4. Assuming, however, for the sake of argument, that Boo-Row's acquiescence, for example, in the signing by Lowe of Forms P-1 reporting production on certain leases for which Boo-Row was the record operator reasonably could mislead a third party into believing that Boo-Row had authorized Lowe to sign any and all Commission forms, including a "change of operator" Form P-4, still there is no evidence that Squyres *knew* that Lowe had signed Forms P-1 for Boo-Row at the time it invited the signature of Lowe on the Forms P-4 that transferred the Davis Leases to Boo-Row; and if Squyres did not, at the time, know of the Forms P-1, it could not have been misled by them.

Squyres argues that Boo-Row clothed Lowe with "apparent" authority to sign the Forms P-4 transferring the Davis Leases to Boo-Row by its conduct in: (1) allowing Lowe to deal with Squyres at Boo-Row's offices; (2) allowing Lowe to supervise operation of certain oil leases of which Boo-Row was the record operator; (3) allowing Lowe to sign for Boo-Row on certain Commission forms; (4) providing Lowe with a company truck and charge account; (5) failing to advise Squyres of limitations on Lowe's authority; and (6) allowing the "consummation" of the Form P-4 transfers in Boo-Row's office with the assistance of a Boo-Row secretary.<sup>13</sup>

On the other hand, there is no evidence in the record that at the time Squyres invited Lowe's signature on the Forms P-4 that transferred the Davis Leases to Boo-Row, Squyres knew from *Boo-Row's* conduct anything about Lowe's relationship with Boo-Row other than that, at times, Lowe could be found at Boo-Row's shop and had a Boo-Row business card.<sup>14</sup> The assertion that Boo-Row "allowed" use of its shop for Lowe's signing of the Forms P-4 transferring the Davis Leases, with the assistance of a Boo-Row secretary, is a conclusion that Squyres reaches. The evidence shows only that after several unsuccessful trips, Squyres' Field Supervisor obtained Lowe's signature while Lowe was out in Boo-Row's yard, and the extent of participation by Boo-Row's secretary was to respond to a question from

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<sup>13</sup> Squyres' Closing Statement, page 7.

<sup>14</sup> Jerry Cramer, a Field Supervisor for Squyres, who obtained Lowe's signature on the Forms P-4, testified that "as far as he knew," Lowe officed at Boo-Row, but he also testified that he made several trips to Boo-Row's office before he located Lowe there. He also testified that he remembered seeing one of Lowe's business cards, but if Lowe ever gave him one, he no longer had it. Nail testified that Boo-Row's shop was a "typical old type pump shop" in a 40' x 60' metal building with dirty floors, no air conditioning, doors open, "stray dogs running through," and rig hands of other operators and well service companies hanging around.

Lowe as to Boo-Row's operator number.<sup>15</sup> There is no probative evidence of any *context* in which Boo-Row reasonably could have been expected to advise Squyres that Lowe had no authority to sign "change of operator" Forms P-4 for Boo-Row or otherwise to inform Squyres of limitations on Lowe's authority.<sup>16</sup> There is no evidence that at the time Squyres invited Lowe to sign the Forms P-4 transferring the Davis Leases to Boo-Row, Squyres *knew* that Lowe supervised certain oil leases of which Boo-Row was the record operator, or that Lowe previously had signed Forms P-1 for these oil leases<sup>17</sup>, or that Boo-Row had provided Lowe with a company truck and charge account. In the absence of evidence of contemporaneous knowledge of these things, it cannot be concluded that Squyres was misled by them.

At the time Lowe signed the Forms P-4 transferring the Davis Leases to Boo-Row, the wells on the leases appear to have been from 55 to 81 years old and were inactive. According to Commission production records, two of the wells had not produced for at least 9 years. The other two wells had been inactive since July 2001, and had reported only minimal production prior to that time.

It appears from the evidence that as of 2002, Squyres was pursuing Lowe to accept a transfer of these wells, because Squyres did not want to incur expenses associated with the wells, particularly the expense of H-15 testing. The "Memorandum of Law" filed in this docket by Squyres represented that Squyres assigned the mineral leases underlying the Davis Leases to Kenny Lowe d/b/a Lowe Well Service effective December 15, 2000. The evidence shows that on January 1, 2001, Squyres and Lowe signed Forms P-4 to change the operator of the Davis Leases from Squyres to Lowe Well Service, although, for reasons not proved in the record, these Forms P-4 were never approved by the Commission. These facts suggest a reason for the January 1, 2001, effective date on two of the Forms P-4 that Lowe signed to transfer the Davis Leases to Boo-Row, even though Boo-Row apparently did not even exist as a Form P-5 operator as of that date. As of November 2002, when Lowe signed these Forms P-4, the Form P-5 Organization Report for Lowe Well Service was delinquent, so that the Davis Leases could not be transferred to Lowe's own company. A *personal* interest of Lowe, or perhaps even an obligation, to accept a transfer of the Davis Leases from Squyres can be inferred. In contrast, the record does *not* show any motivation or interest of Boo-Row to accept a transfer of the Davis Leases, and Boo-Row's prompt objection to the transfer suggests that it had none.

The examiners share Squyres' concern that indiscriminate revocation of approvals of "change of

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<sup>15</sup> There is no evidence that Boo-Row's secretary was told the purpose of Lowe's question, or that the secretary informed Nail, who had always signed for Boo-Row on Forms P-4 transferring oil leases or gas wells to Boo-Row.

<sup>16</sup> Nail testified that Boo-Row did not learn that Lowe had signed the Forms P-4 transferring the Davis Leases to Boo-Row until it was too late to do anything about it. Persons dealing with an assumed agent are bound to ascertain not only the existence of the agency itself, but also the extent of the assumed agent's authority. *Boucher v. City Paint & Supply, Inc.*, 398 S.W.2d 352, 356 (Tex. Civ. App.-Tyler 1966, no writ); *Green v. Hugo*, 17 S.W. 79 (Tex. 1891).

<sup>17</sup> Only 2 of the Forms P-1 that Lowe signed, purportedly as "agent" for Boo-Row, were signed prior to the date of Lowe's signatures on the "change of operator" Forms P-4 that transferred the Davis Leases from Squyres to Boo-Row.

operator” Forms P-4 could have a undesirable impact on the Commission’s ability in future cases to fix operator responsibility for regulatory compliance. On the other hand, adoption of Squyres’ apparent position that administrative approvals of “change of operator” Forms P-4 should be simply *irreversible*, regardless of the circumstances, is equally undesirable. This is not a case involving a complaint after a long period of Boo-Row acquiescence in oil lease or gas well transfers or other actions by Boo-Row that could be interpreted as a ratification of such transfers. The dire consequences feared by Squyres appear unlikely to the examiners, not only because contested cases involving revocation of approvals of “change of operator” Forms P-4 are rare, but also because there are factors at play in this case that make it easily distinguishable from a less meritorious future case of the same kind.

Based on the record in this case, the examiners recommend adoption of the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. At least ten (10) days notice of the hearing in this docket was sent to all parties entitled to notice.
2. This hearing was called to consider the complaint of Boo-Row Pipe & Supply, Inc. (“Boo-Row”), that Forms P-4 (Certificates of Compliance and Transportation Authority) changing the operator of the J. W. Davis (03932) Lease, the J. W. Davis Lease, Well No. 1 (RRC ID No. 122630), and the J. W. Davis Lease, Well No. 13 (RRC ID No. 122631) (“Davis Leases”) from Squyres Oil Company, Inc. (“Squyres”) to Boo-Row, which the Commission approved on May 13-15, 2003, were signed on behalf of Boo-Row by a person having no authority to execute the Forms P-4. Boo-Row seeks revocation of the Commission’s approval of the Forms P-4.
3. The Forms P-4 changing the operator of the Davis Leases from Squyres to Boo-Row were filed with the Commission on or about November 18, 2002.
  - a. The Forms P-4 were signed on behalf of Squyres by Jan Goodall, Secretary, on November 1, 2002.
  - b. The Forms P-4 were signed purportedly on behalf of Boo-Row by Kenny Lowe (“Lowe”) on November 1, 2002.
  - c. Lowe entered the word “Agent” below his signature on the Forms P-4, and checked both the “Authorized Employee of current operator” and “Authorized agent of current operator” portions of Item 16 of the Forms.
  - d. Item 11 (“Effective date”) of the Forms P-4 was completed with the date January 1, 2001. On the Form P-4 relating to the J. W. Davis (03932) Lease, the January 1, 2001, effective date was stricken, and the date November 18, 2002, was interlineated.

4. The Commission notified Boo-Row of approval of the Forms P-4 changing the operator of the Davis Leases from Squyres to Boo-Row by "Form P-4 Notification" mailed on or about May 15, 2003. Boo-Row filed its complaint objecting to these approvals on May 23, 2003.
5. Boo-Row was first organized as a Form P-5 operator in August 2002.
6. Since the date of its incorporation, Boo-Row's only officer has been James Henry Nail III ("Nail"), who has been President, Secretary, and Treasurer. The Forms P-5 (Organization Report) filed with the Commission by Boo-Row on August 14, 2002, and September 2, 2003, listed Nail as Boo-Row's only officer, and did not list Lowe either as an officer or agent with authority to sign Forms P-4 to change the operator of an oil lease or gas well.
7. Squyres was designated operator of the Davis Leases by approved Form P-4 transfers effective December 1, 1996. In 2001, Squyres attempted to transfer the Davis Leases to Lowe Well Service by Form P-4 filings signed on January 1, 2001, on behalf of Squyres by Jan Goodall and on behalf of Lowe Well Service by Lowe. Lowe was the owner and resident agent of Lowe Well Service. For undisclosed reasons, these 2001 Forms P-4 were not approved by the Commission.
8. The Form P-5 (Organization Report) of Lowe Well Service became delinquent in May 2001.
9. At the time Lowe signed the Forms P-4 to change the operator of the Davis Leases from Squyres to Boo-Row, the wells on the leases were from 55 to 81 years old and were inactive.
  - a. The J. W. Davis Lease, Well No. 1 (RRC ID No. 122630) was drilled to a total depth of 1,920' and was completed on February 21, 1921. No production has been reported to the Commission for this well since prior to January 1, 1993.
  - b. The J. W. Davis Lease, Well No. 13 (RRC ID No. 122631) was drilled to a total depth of 1,940' and was completed on June 16, 1947. No production has been reported to the Commission for this well since prior to January 1, 1993.
  - c. The J. W. Davis (03932) Lease, Well No. 10 was drilled to a total depth of 1,974' and was completed in January 1947.
  - d. The total depth and completion date for the J. W. Davis (03932) Lease, Well No. 8 are not disclosed by Commission records.
  - e. No production has been reported for any well on the J. W. Davis (03932) Lease since July 2001. Production of 14 barrels of oil was reported for the period May-July 2001, with no report or zero reported production for the remainder of 2001. Between January 1, 1993, and December 31, 2000, production of no more than one barrel of oil was reported for this lease during any month.

**Proposal for Decision**

10. Since inception of Boo-Row's business as an operator, Nail has been the only person authorized to sign "change of operator" Forms P-4 on behalf of Boo-Row. As of October 15, 2004, Boo-Row was the record operator of 38 oil leases or gas wells. Nail signed the Forms P-4 transferring 35 of these leases and wells to Boo-Row. The three exceptions are the Forms P-4 relating to transfer of the Davis Leases to Boo-Row, which were signed by Lowe.
11. Lowe was not a person authorized to sign "change of operator" Forms P-4 on behalf of Boo-Row.
  - a. Lowe acted as an intermediary involved in the sale and delivery of Boo-Row pipe and equipment to purchasers obtained by Lowe and supervised physical operation of four oil leases in which he and Boo-Row each owned a 50% working interest and of which Boo-Row was the record operator.
  - b. Lowe was not paid a salary by Boo-Row, and his "commissions" were the difference between Boo-Row's price for pipe and equipment and such higher prices as Lowe was able to negotiate with purchasers.
  - c. Boo-Row did not consider Lowe as a Boo-Row employee and did not report him as such on Employer's Quarterly Reports to the Texas Workforce Commission.
  - d. Boo-Row did not require that Lowe keep any particular hours of work or devote any particular amount of time to sale of Boo-Row pipe or equipment or supervision of the four oil leases in which Lowe held a working interest.
  - e. Boo-Row did not keep track of the amount of time that Lowe devoted to sale of Boo-Row pipe or equipment or supervision of the four oil leases in which Lowe held a working interest.
  - f. Boo-Row did not direct Lowe as to how, where, or when to conduct his activities.
  - g. At no time did Boo-Row ever grant to Lowe the authority to sign "change of operator" Forms P-4 on behalf of Boo-Row, or do or say anything that would have given Lowe the impression that he had such authority.
12. Neither Boo-Row nor Nail held Lowe out to Squyres or anyone else as a person authorized to sign "change of operator" Forms P-4 on behalf of Boo-Row.
13. Neither Boo-Row nor Nail engaged in conduct that could have led Squyres or anyone else reasonably to believe that Lowe was a person authorized to sign "change of operator" Forms P-4 on behalf of Boo-Row.
14. Squyres did not submit any probative evidence that it made any inquiry of Boo-Row or Nail as to



Lowe's authority to sign for Boo-Row on the Forms P-4 changing the operator of the Davis Leases from Squyres to Boo-Row.

15. Squyres was not misled by any statements or conduct of Boo-Row or Nail into believing that Lowe had authority to sign for Boo-Row on the Forms P-4 changing the operator of the Davis Leases from Squyres to Boo-Row.
16. The Commission's Form P-4 and its instructions provide that where the Form is filed for the purpose of changing the operator of an oil lease or gas well, the Form must be signed for the previous operator and the proposed new operator by duly authorized employees or agents.

### **CONCLUSIONS OF LAW**

1. Proper notice of hearing was timely issued by the Railroad Commission to appropriate persons legally entitled to notice.
2. All things necessary to the Commission attaining jurisdiction over the subject matter and the parties to this hearing have been performed or have occurred.
3. Pursuant to Statewide Rule 58 [16 TEX. ADMIN. CODE §3.58], the Commission requires the filing of Form P-4 to change the designation of an operator of an oil lease or gas well.
4. Pursuant to Statewide Rules 1 and 58 [16 TEX. ADMIN. CODE §3.1 and §3.58], no Form P-4 designating or changing the designation of an operator will be approved that is signed, either as transferor or transferee, by a non-employee agent of an organization unless the organization has filed with the Commission, on its Form P-5 Organization Report, the name of the non-employee agent it has authorized to sign on its behalf.
5. The Commission's Form P-4 requires that when the Form is filed for the purpose of changing the designation of an operator of an oil lease or gas well, the Form must be signed on behalf of both the previous operator and the proposed new operator by a duly authorized employee or agent.
6. Kenny Lowe was not an employee or agent of Boo-Row Pipe & Supply, Inc., with actual or apparent authority to sign for Boo-Row on the Forms P-4 changing the designation of operator of the J. W. Davis (03932) Lease, the J. W. Davis Lease, Well No. 1 (RRC ID No. 122630), and the J. W. Davis Lease, Well No. 13 (RRC ID No. 122631) from Squyres Oil Company, Inc., to Boo-Row.
7. The Commission has the authority to revoke administrative approvals of Forms P-4 changing the designation of operator of an oil lease or gas well where it is established that a person signing the Forms P-4 was not a duly authorized employee or agent of the previous or proposed new operator.

8. The administrative approvals of the Forms P-4 changing the designation of operator of the J. W. Davis (03932) Lease, the J. W. Davis Lease, Well No. 1 (RRC ID No. 122630), and the J. W. Davis Lease, Well No. 13 from Squyres Oil Company to Boo-Row Pipe & Supply, Inc., should be revoked because (a) the Forms P-4 were signed for Boo-Row by a person who was not a duly authorized employee or agent of Boo-Row; (b) Boo-Row promptly objected to the approvals of the Forms P-4; and (c) Boo-Row did not, either by conduct or acquiescence, ratify the non-authorized signatures for Boo-Row on the Forms P-4.

**RECOMMENDATION**

The examiners recommend that the Commission enter the attached final order revoking the administrative approvals of the Forms P-4 changing the designation of operator of the Davis Leases from Squyres Oil Company, Inc., to Boo-Row Pipe & Supply, Inc.

Respectfully submitted,

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Hearings Examiner

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